88-1459

No.

Supreme Court, U.S.
FILED
FEB 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMBROSE DAIGLE,

Petitioner,

v.

GULF STATES UTILITY COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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27 pp

QUESTIONS PRESENTED

I.

Is a Defendant "Estopped" to urge the failure to arbitrate, and therefore the six (6) months Statute of Limitations, as a bar to Plaintiff's action when said Defendant successfully obtained denial of the grievance procedure through false and misleading statements?

II.

Where an employee accepts termination of employment as final, and merely seeks damages, is there a necessity to pursue Grievance and Arbitration?

CERTIFICATE OF INTERESTED PARTIES

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuits:

(1) Ambrose Daigle, Petitioner (Daigle)

(2) Gulf States Utility Company, Respondent, (GSU).

(3) Lester R. Buzbee, III, attorney for Ambrose Daigle.

(4) Darrell McAlexander, attorney for Ambrose Daigle.

(5) Robert J. Hambright, attorney for Gulf States Utility Company.

(6) William E. Heaner, Jr., attorney for Gulf States Utility Company.

INDEX

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CASES	iv
OPIONIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	8
APPENDIX A	
Opinion of United States Court of Appeals for The Fifth Circuit of October 20, 1988	1a
Memorandum Opinion and Order, United States District Court for the Eastern District, November 5, 1987	5a
Order Motion for Rehearings November 17, 1988	11a
APPENDIX B	
29 USCA 160 (b)	12a

TABLE OF CASES

	Page
Boone vs Armstrong Cork Co., 384 F.2d 285, (C.A. 5th 1967)	6
Carbarga Cruz vs Fundacion Educative Ana G. Mendez, Inc., 822 F.2d 188 (C.A. 1st 1987)	7
Day vs United Auto, Aerospace and Agr. Implement Workers of America, Local 36 of UAW, 466 F.2d 83 (C.A. 6th 1972)	6
DelCostello vs International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2286, 76 L.Ed.2d 476 (1983)	2, 3
Gilotrap vs Mitchell Bros. Truck Lines, 529 P.2d 370 (OR, 1974 Cert. Den. 96 S.Ct 2415, 421 U.S. 1011, 44 L.Ed 2d 679)	7
Glus vs Brooklyn Eastern District Terminal, 359 U.S. 231, 3 L.Ed. 2d 770 (1959)	6
Hines vs Anchor Motor Freight, Inc., 424 U.S. 554, 47 L.Ed.2d 231 (1976)	5
Jackson vs Southern Pac. Transp. Co., 533 F. Supp 276 (D.C. Tex 1982)	5
Learning Works, Inc. vs The Learning Annex, Inc. 830 F. 2d 541 (C.A. 4th 1987)	6
McBride vs Beaumont City Lions, Inc., 356 SW2d 395 (Tx. Civ. App. - Beaumont, 1962 dism)	5
Mosler Steel Co. vs NLRB, 568 F.2d 436 (C.A. 5, Tex. 1978)	4
Schultz vs Owens Illinois Inc., 696 F.2d 505 (C.A. 7th 1982)	6

Smith vs Pittsburgh Cage and Supply Co.,
464 F.2d 870 (C.A. PA. 1972) 5

Vaca vs Sipes, 386 U.S. 171, 17 L.Ed.2d 842 (1967) 4

Woodward Iron Company vs Frisco Transp. Co.,
626 F.2d 55 (C.A. 8th 1980) 7

STATUTES
29 USCA 160 (b) 12a

TREATISES
31 C.J.S. Estoppel Sec. 163 6

IN THE

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No._____

AMBROSE DAIGLE,

Petitioner,

v.

GULF STATES UTILITY COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Ambrose Daigle, the Petitioner, prays that a Writ of Certiorari issue to review the Judgement of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 20, 1988, and Rehearing denied on November 17, 1988.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit was not reported and is printed in Appendix A, *infra*, page 1a. The Judgement of the United States District Court for the Eastern District of Texas, Beaumont Division, is printed in Appendix A, *infra*, page 6a.

JURISDICTION

The Judgement of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 1a) was entered on October 20, 1988. A Motion for Rehearing was filed and overruled on November 17, 1988. The Jurisdiction of the Supreme Court is involved pursuant to 28 USCA Section 1254(1).

STATUTES INVOLVED

29 USCA 160(b) Prevention of unfair labor practices--Powers of Board generally (Appendix B, infra. page 13a)

STATEMENT OF THE CASE

Petitioner is suing *Gulf States Utilities Company* for breach of contract, wrongful discharge, and seeks damages. The U.S. Magistrate, on a Motion to Dismiss, dismissed Plaintiff's case as barred by the six (6) month Statute of Limitations.

Petitioner originally filed suit naming *Gulf States Utilities Company* the Union and The Texas Employment Commision. The case was dismissed, barred by the six (6) month Statute of Limitations as set forth in *DelCostello vs International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2286, 76 L.Ed.2d 476 (1983).* The Fifth Circuit affirmed in part and reversed in part and remanded for a determination of whether Petitioner was required to go through grievance and arbitration, and if so, are such procedures final and binding on the parties?

On remand the trial court, pursuant to Rule 12(b) F.R.C.P., dismissed Petitioner's case as barred by the six (6) Statute of Limitations for failure to go through the grievance and arbitration procedure. The Fifth Circuit upheld the trial court's ruling.

THE EVIDENCE:

On October 12, 1982, Petitioner was discharged after

31 1/2 years from *Gulf States Utility Company*. On October 17, 1982, though not a member, Petitioner requested that the *International Brotherhood of Electrical Workers* (hereinafter referred to as IBEW), Local 2286, file a grievance on his behalf. On or about October 29, 1982, Petitioner filed his "charge" with the national Labor Relations Board (hereinafter referred to as *NLRB*).

Respondent, through the offices of false affidavits and misstatement, know to be false, obtained a refusal by the NLRB on May 23, 1983 to file a complaint. By the same or similar false and misleading statements, on November 19, 1982, obtained the refusal by the IBEW to file a grievance on behalf of Petitioner.

THE RULINGS BELOW:

In 1985 the District Court granted Respondent's F.R.C.P. Rule 12 Motion and dismissed Petitioner's complaint. The Fifth Circuit reversed in part and remanded in part for determination of whether or not grievance and arbitration were required and if so, whether or not they were binding.

In 1987 the District Court again granted Respondent's F.R.C.P. Rule 12 Motion and dismissed Petitioner's complaint. The Fifth Circuit held that this suit is a "classic hybrid Sec. 301 action" and the six-month statute of limitations applied and affirmed the Judgment of the District Court. The Fifth Circuit denied the Motion for Rehearing without comment.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to determine whether or not a respondent may be estopped to rely on the six-month statute of limitation as established in *DelCostello (supra)*.

The issue in this cause is whether or not the Respondent is estopped from alleging the Collective Bargaining Agreement, and therefore the six-month statute of limitation, as a bar to

Petitioner's claim. The Respondent is also estopped from alleging such agreement was mandatory or binding. As here, where a defendant actively sought the denial of the grievance procedure through misstatements, willful and known falsehoods, to induce the union, to refuse to file both Grievance and Arbitration, estoppel is mandated. The Respondent's also, actively sought the denial of the issuance of the complaint by the NLRB through false and untrue statements. Respondent's Plant Supervisor, Jimmy Smith by affidavit stated, "...I knew that Daigle carried a knife..."(TR361); However, in Smith's deposition, Page 20, line 20, he admits he never saw Daigle with a lethal weapon. He further swore, "...Daigle reported...his car tires had been cut..." "...Daigle said he knew who had did it but that he would not tell me, that he would take care of it himself." (TR363)

However in his deposition at pages 41-43, Smith admitted that Daigle in fact requested no action be taken that, "he didn't want to find out who did it and he thought that the person that did it probably had a family and he wanted to leave things alone. He never made any statement that he would take care of it himself or anything like that". He further swore, "On April 26, 1982, Michael Page, told his shift supervisor that Daigle said he was going to get Ed Steward, a union steward, out the gate and cut him up over something Steward has said about him. I had noticed an increase in the type of conduct by Daigle" (TR363)). Again in his deposition at pages 21-23, Smith admitted that in reality that it was Daigle who was being attacked, not Steward as he alleged. In fact, the supervisor on the spot stated, "Ambrose was catching hell and didn't say anything." In providing the Union the discretion to supervise the grievance machinery and to invoke arbitration, it was assumed that similar complaints would be treated consistently. Therefore, the settlement process furthers the interest of the Union as statutory agent and Co-author of the bargaining agreement in representing employees in enforcement of the agreement. *Vaca vs Sipes, 386 U.S. 171, 17 L.Ed.2d 842 (1967).* The thrust of labor law is not, however, the protection of the Union or the employer, but rather the protection of the employee, and a decision that would operate to the disadvantage of the employee, at minimum, to be avoided. *Mosler Steel Co. vs NLRB, 568 F.2d 436* (C.A. 5, Tex.

1978). Although Congress put its blessing on private dispute settlement arrangements provided in collective bargaining agreements, it was anticipated that the contractual machinery would operate with some minimum levels of integrity. *Hines vs Anchor Motor Freight, Inc., 424 U.S. 554, 47 L.Ed.2d 231 (1976)*

Mr. Baker, Respondent's Manager of Industrial Relations, states in his affidavit that Daigle was indicted for threatening an individual with a knife and was indicted for murder, neither happening on the job, but to show, "Daigle's propensity for violence" (TR 357, 358). At page 37 & 38 of Smith's deposition he admitted that they knew Daigle had been found not guilty on all occasions.

Mr. Baker's letter to the Union (TR 353 & 354) states Daigle was counseled about threats to kill Ed Steward or Joe Hoell. However company records of investigation of the incident shows that Daigle was the victim of threats, not the other way around, (Smith's Deposition Page 21-23), and that Defendant knew of this.

Mr. Baker, in his letter to the Union, (TR 355), states that Mr. Daigle's behavior continued to deteriorate. Also in his second letter to the Union, (TR 354), and in his affidavit to the NLRB, (TR 359), he indicated these claims were only highlights and that there were other "documented" incidents. However, in his deposition, page 42, Baker testified there were only three (3) disciplinary actions against Daigle in thirty-one (31) years of employment. Further, Smith in his deposition testified, (P. 29), that there were no complaints against Daigle in 1981 and in fact, he was even offered a promotion.

To preserve justice for the individual, our Courts have constantly maintained that where an employer has actively sought the denial of grievance procedures through misstatements or fraud, the application of the doctrine of estoppel is mandated. *Smith vs Pittsburgh Cage and Supply Co., 464 F.2d 870 (C.A. PA. 1972); Jackson vs Southern PAC. Transp. Co., 533 F.Supp 276 (D.C. Tex 1982); also see: McBride vs Beaumont City Lions, Inc., 356S.W. 2d 395* (Tx. Civ. App.-

Beaumont, 1962 dism). This theory of law has been applied to both employer and union where employees were misled. *Schultz vs Owens Illinois Inc., 696 F.2d 505 (C.A. 7th 1982).* Also, where the employer made misstatements to the employee. *Day vs United Auto, Aerospace and Agr. Implement Workers of America, Local 36 of UAW, 466 F.2d 83 (C.A. 6th 1972).* Such conduct by an employer is comparable to a refusal to abide by the contract which should also estop the employer. *Boone vs Armstrong Cork Co., 384 F.2d 285, (C.A. 5th 1967).*

The maxim that no man may take advantage of his own wrong is applied in many diverse classes of cases by both law and equity courts. It is frequently employed to bar inequitable reliance on Statutes of Limitations. *Glus vs Brooklyn Eastern District Terminal, 359 U.S. 231; 3 L.Ed2d 770, (1959); Learning Works, Inc. vs The Learning Annex, Inc. 830 F.2d 541 (C.A. 4th 1987);*

As this case was decided on a Rule 12 Motion, all fact questions should have been resolved in Petitioner's favor, and it has been broadly held that estoppel, or the existence thereof, is a fact question. 31 C.J.S. Estoppel Sec. 163.

The Respondent, by, its own actions, is estopped to plead the grievance and arbitration portion of the contract. Therefore, Petitioner's cause is not time barred and should proceed to a trial on the merits on these issues of fact as stated above.

II.

Certiorari should be granted in order to determine whether or not an employee may proceed by action directly against the employer when the union, in good faith, but mistakenly, refuses to process the grievance and arbitration is mandatory when the employees seeks only damages and not re-employment.

Where the employee is required to proceed through the Union, and the Union refuses to process his claim for wrongful discharge, he may proceed by action directly against the employer. The Contract in question required the employee to go through the Union, Article VI Sect. 9; and Article VII Sect.

3 (TR 333). Such failure by the Union will not deprive the employee of his right to resort to the Courts on any theory that he has failed to exhaust his Contract remedies. The Courts should be open to an individual employee to assert a common law action for damages when his alternative is to resort to grievance proceeding before arbiters already combined against him. *Woodward Iron Company vs Frisco Transp. Co., 626 F.2D 55 (C.A. 8th 1980); Gilotrap vs Mitchell Bros. Truck Lines, 529 P.2d 370 (OR, 1974 Cert. Den. 96 S.Ct 2415, 421 U.S. 1011, 44 L.Ed 2d 679).*

An employee who makes claim against an employer alleging wrongful termination, is not required to exhaust grievance remedies where the union has the sole power to invoke such procedures and wrongfully or mistakenly, refuses to process or perfunctorily handles the grievance, or where resort to such procedures would be futile or where the employer repudiates the grievance procedures. *Carbarga Cruz vs Fundacion Educative Ana G. Mendez, Inc., 822 F.2d 188 (C.A. 1st 1987).*

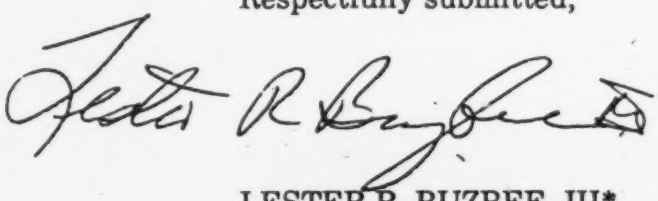
Further, where an employee sues his employers for wrongful discharge, seeks damages and accepts the termination, there is no necessity of pursuing grievance and/or arbitration. Where there is alleged a wrongful termination and there is no evidence that the employee's Union was guilty of unfair representation, the applicable Statute of Limitations is that provided by state law rather than the six-month limitation period provided for a hybrid claim. *Carbarga Cruz vs Fundacion Educative Ana G. Mendez, Inc. (supra).*

Therefore, with the facts of this case, the Petitioner's cause of action should not be bound by the six-month Statute of Limitation and grievance and arbitration should not be required.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-6252
Summary Calendar

AMBROSE DAIGLE,
Plaintiff-Appellant,

v.

GULF STATES UTILITIES COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(B-83-00704-CA)

(October 20, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.
PER CURIAM:*

Ambrose Daigle appeals the district court's dismissal of his claim under S 301 of the Labor-Management Relations Act of 1947

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

for failure to comply with the six-months statute of limitations applicable to hybrid S 301/duty of fair representation actions. Finding that the grievance procedures under the governing collective bargaining agreement were mandatory and binding, thereby making the suit a "classic hybrid S 301" action, we affirm.

I.

Ambrose Daigle was discharged from his employment with Gulf States Utilities Company (Gulf States) on October 12, 1982, for violation of a work rule. The International Brotherhood of Electrical Workers (IBEW), which represented Daigle's collective bargaining unit, declined to file a grievance on his behalf with regard to the discharge. Daigle received notice of this decision on November 19, 1982. On August 8, 1983, Daigle filed suit in federal district court against Gulf States and the IBEW. He alleged that his discharge violated the terms of the collective bargaining agreement and that the union had breached its duty of fair representation by not pursuing grievance procedures. The magistrate, who tried the action by agreement, dismissed the claims, since admittedly the complaint was filed more than six months after Daigle was notified that the IBEW would not file a grievance.

A panel of this court affirmed the dismissal in part and remanded the action for a determination of whether the dispute resolution procedures outlined in the collective bargaining agreement were mandatory and binding. *Daigle v. Gulf State Utilities Co., 794 F.2d 974 (5th Cir. 1986).* Remand was necessary because the collective bargaining agreement was not part of the record on appeal. On remand, the magistrate ruled that the grievance procedures provided by that agreement were mandatory, and again dismissed the complaint as time-barred. We affirm.

II.

Section 301 of the Labor-Management Relations Act of 1947 places within a district court's jurisdiction a cause of action by an employee against an employer for breach of a

collectvely bargained employment contract. Jurisdiction of a related action against the union for failure to adequately represent a claimant is implied in the statutory framework. If the grievance and arbitration procedure provided to an employee in the collective bargaining agreement is simply an alternative method of dispute resolution, the employee may bring an action against the employer for breach of the employment contract pursuant to S 301. In such a contact action, the state statute of limitations for contract claims is applicable.

If, on the other hand, the grievance procedures are mandatory and binding, the employee must exhaust those procedures before bringing an action against his employer. If grievance procedures are mandatory, the employee must prove that the union violated its implied statutory duty of fair representation in order to maintain the action. If such proof is not made, the employee is bound by the results of the grievance procedures. The survival of the breach of contract claim thus depends upon the viability of the claim against the union, and the two actions are "inextricably interdependent." *United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981).* Such a suit is a "classic hybrid S 301 action," and the six-month statute of limitations made applicable to fair representation actions against the union by *Delcostello v. International Brotherhood of Teamster, 462 U.S. 151, 169, 103 S.Ct. 2281, 2293, 76 L.Ed.2d 476 (1983),* controls both claims. Without question, the present action against IBEW is time-barred in this case. Therefore, if the grievance procedure was Daigle's final and exclusive remedy, his action for breach of contract against Gulf States was also properly dismissed.

III.

Daigle maintains that the dispute resolution procedures in the collective bargaining agreement are optional with the parties. The magistrate found, however, that they were the mandatory and exclusive steps for handling complaints such as Daigle's. We agree.

Article VI, S 1 of the collective bargaining agreement defines "grievance" as "any dispute that may arise between

one or more employees or the Union and Employer involving the proper application of this Agreement." Under S 2, "all such grievances must be presented and processed soley in accordance with" the three step procedure provided. Any grievance not so presented "will be deemed to no longer exist." Under this language the parties are not free to choose between the formal grievance procedures and the pursuit of an action in court.

If a dispute is not settled in the early stages of the grievance procedures, the agreement provides for submission of the dispute to an arbitrator whose decision shall be binding. Daigle contends that the arbitration is optional, and is binding only if requested by one or both parties. He relies on the language of Article VII, S 3, which provides that a grievance "may be presented for arbitration," to bolster his assertion that arbitration is not mandated by the agreement. This very argument was rejected by the Fifth Circuit in *Deaton Truck Line, Inc. v. Local Union 612, International Brotherhood of Teamsters, 314 F.2d 418 (5th Cir. 1962).* The term "may" in this context is construed to grant the claimant permission to abandon his complaint. However, if he chooses to pursue it, his exclusive remedy is through the procedures provided in the agreement.

Clearly, Daigle's suit is a "classic hybrid S 301 action." Since the six-month statute of limitations governing the representation claim has expired, the contract claim against Gulf States cannot survive. The judgement of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

AMBROSE DAIGLE

vs. CIVIL ACTION NUMBER B-83-704-CA

GULF STATES UTILITIES COMPANY, ET. AL.

MEMORANDUM OPINION AND ORDER

This case is before the Court on defendant Gulf States Utilities Company's motion to dismiss Plaintiff's remaining cause of action after remand by the United States Court of Appeals for the Fifth Circuit. Plaintiff, Ambrose Daigle, originally filed suit against multiple defendants, including Gulf States Utilities Company, and all causes of action were dismissed by United States Magistrate Earl S. Hines. Plaintiff appealed that decision. The Fifth Circuit affirmed the dismissal except for one claim which was remanded with instructions for further consideration. *Daigle v. Gulf States Utilities Company, Local Union Number 2286, 794 F.2d 974 (5th Cir. 1986)*, cert. denied, ___U.S.___, 107 S.Ct. 648 (1986).

Plaintiff's suit against Gulf States Utilities Company arises from his discharge as an employee of that business for violation of company work rule. Because the discharge occured more than six months prior to the filing of this lawsuit, Magistrate Hines dismissed that action as barred by the six month statute of limitations imposed by S 301 of the Labor Management Relations Act (L.M.R.A.) and *DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).* In reviewing Magistrate Hines' decision, the Fifth Circuit explained that in order for the L.M.R.A.'s six month statute of limitations to apply in this case, Plaintiff's claim must be characterized as "a classic hybrid S 301 claim of employer breach of contract and union breach of the duty of fair representation." Daigle, 794 F.2d at 977. In other words, if Plaintiff's claim against G.S.U. is a

"classic hybrid S-301," his case must be dismissed for failure to comply with the six month statute of limitations. If, on the other hand, Plaintiff's claim is a straight forward breach of contract case, the four year statute of limitations under Texas law would apply. Plaintiff's cause of action would remain viable. *Daigle, 794 F.2d at 977.*

A "classic hybrid S 301" claim arises in situations in which the collective bargaining agreement provides for the final and binding settlement of grievance through private, out of court, dispute settlement procedures. The claimant challenges two things: 1) that the discharge from employment by the company is contrary to the terms of the contract itself, and 2) that the Union failed in its duty to adequately represent the claimant during the grievance proceedings pursuant to the contract. Both elements must be raised by the plaintiff, because otherwise the parties are bound by the results of the private settlement process as to the discharge itself. *DelCostello, 462 U.S. at 166, 103 S.Ct. at 2291.* If the private settlement procedures of the collective bargaining agreement are not binding and final on the parties, then the claim is simply one of breach of contract and may be brought separately from any claim against the Union. *Vaca v. Sipes, 386 U.S. 171, 183, 87 S.Ct. 903, 913, 17 L.Ed.2d 842 (1967).*

The Fifth Circuit was unable to make that determination in this case because the collective bargaining agreement was not in the record on appeal. The case was remanded with instructions to review the collective bargaining agreement to determine which statute of limitations would apply based on the language of the agreement itself. Specificly, the Fifth Circuit instructed that:

> "If the contract contains the typical provision that aggrieved parties must go through the grievance and arbitration procedures and the procedures' resolution is final and binding on the parties, appellant's suit against both employer and union is barred . . . Only if the arbitration and grievance procedures in the contract are alternative procedures, leaving the aggrieved employee and the exclusive bargaining representative free to use or not use them as they wish does the state

> statute of limitations for breach of contract apply to appellant's S 301 suit." *Daigle,* 794 F.2d at 978.

The issue presently before this Court is one of interpretation of the provisions of the contract between the parties.[1] A hearing was conducted on September 16, 1987, at which time the collective bargaining agreement was introduced as an exhibit. Plaintiff takes the position that the language of that agreement does not specify that the parties are required to participate in binding grievance and arbitration procedures, but that instead it leaves those options to the discretion of the parties. However, the language of the collective bargaining agreement itself indicates otherwise. A careful examination of the document demonstrates that Plaintiff's claim must be the "classic hybrid S 301" type that is controlled by the six month statute of limitations.

The collective bargaining agreement is divided into articles covering various subjects, and Article VI is entitled "Adjustment of Grievances." Section 2 of Article VI sets out in detail the steps required to be followed by the employees, union and employer, G.S.U., in processing grievances. The prefatory language of that section makes it clear that the procedures outlined therein are mandatory and exclusive:

> "All such grievances must be processed solely in accordance with the following procedure ..." Article VI, Section 2, Collective Bargaining Agreement. (emphasis added)

The required mechanism for handling grievances, including "[d]isciplinary layoff and discharge grievance,"[2] are then described in the remainder of Section 2.

---

1. Subsequent to remand, this case was transferred to Magistrate J. Michael Bradford for all further proceedings.

2. Article VI, Section 4 provides: "Discplinary layoff and discharge grievances shall first be presented at step 2." That same Section provides that the company will notify a Union representative of any "employee's discharge" within five days of the action.

In summary, the grievance process is composed of three "steps" that provide various time periods for notice of the problem to company representatives and additional time periods to attempt to resolve the dispute. The first step involves notification of the employee's supervisor with an attempt at informal settlement. If that fails to end the matter, a second step provides for notice to a "department head" with a subsequent formal hearing. If the dispute is still not resolved, the third step calls for notice to the company president who is given a final time period to respond to the complaint.

Article VI, Section 5 states clearly that failure to follow the above described steps in processing grievances will result in the waiver of any claims:

> "Any grievance not presented or thereafter processed within the prescribed time limits specified above will be deemed to no longer exist." Article VI, Section 5.

Contrary to Plaintiff's assertions, the grievance procedures are not optional with the parties. Instead, they are mandatory and exclusive steps in handling complaints such as disciplinary discharge.

The collective bargaining agreement provides an additional method for processing the grievance if the matter is still not settled after completion of the above described procedures. Article VII provides for arbitration of diputes within 30 days of the completion of the third step of the grievance process. Section 4(b) of Article VII provides that the "decision of the arbitrator shall be in writing, binding the parties . . . " (emphasis added).

Plaintiff contends that the arbitration described in Article VII is optional rather than mandatory for two reasons. First, Plaintiff points to the language in Section 3 of Article VII that provides that a "grievance may be presented for arbitration within thirty days from the date of the third step answer . . . " (emphasis added). Plaintiff argues that use of the word "may" renders the arbitration permissive rather than mandatory. The courts have uniformly held, however, that the use

of the word "may" in the context of arbitration in collective bargaining agreements such as this one is a mandatory term rather than a permissive one. This precise question was addressed by the Fifth Circuit in *Deaton Truck Line, Inc. v Local Union 612, International Brotherhood of Teamsters, 314 F.2d 418 (5th Cir. 1962),* as follows:

> "Appellant argues that the use of the word 'may' in the contract prevents arbitration from being compulsory or obligatory. Clearly, however, 'may' should be construed to give either aggrieved party the option to require arbitration." Id. at 422 (citations omitted).

See also, *Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614 (1965); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343 (1960); Local 771, I.A.T.S.E., v. R.K.O. General, Inc., 546 F.2d 1107 (2nd Cir. 1977); Ceres Marine Terminals, Inc. v. International Longshoremen's Assoc. Local 1969, 683 F.2d 242 (7th Cir. 1982); Bonnot v. Congress of Independent Unions Local #14, 331 F.2d 355 (8th Cir, 1964).*

Plaintiff also argues that the language of the third paragraph of Article VII, Section 1 should be read to make arbitration optional rather than mandatory. That paragraph states that "[a]ny questions of arbitrability on any issue may be determined by a court and not by the arbitrator (emphasis added)." However, that language pertains to a completely different matter. Article VII, Section 1 provides a list of specific issues that "shall not be subject to arbitration . . . " The above language relied on by Plaintiff simply states that controversies concerning which issues are subject to arbitration will be settled by the courts. That language in no way indicates that arbitration itself is optional rather than mandatory, Further, it is clear from the language of Section 1 that the disciplinary discharge of employees is not excluded as an issue for arbitration, and Plaintiff does not make that argument.

The collective bargaining agreement in this case does contain the "typical provision" described by the Fifth Circuit that requires the parties to submit to binding grievance and

arbitration procedures. Plaintiff's claim is therefore the "classic hybrid S 301" type which comes within the six month statute of limitations.

Plaintiff makes several additional arguments about the right to proceed with court action without the need of exhausting arbitration procedures as a prerequisite to filing suit. Whether or not those fact situations apply to this case, none of the exceptions relied on by Plaintiff alters the statute of limitations of six months for bringing suit against the company.

It is therefore ORDERED that Plaintiff Ambrose Daigle's complaint is hereby DISMISSED for this reason stated in this OPINION and ORDER.

RENDERED and SIGNED this 5th day of November, 1987.

J. MICHAEL BRADFORD
UNITED STATES MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-6252

AMBROSE DAIGLE,
Plaintiff-Appellant,

v.

GULF STATES UTILITIES COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING
(November 17, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

CHIEF JUDGE

APPENDIX B

STATUTES INVOLVED

29 USCA 160 (b) Prevention of unfair labor practices-- Powers of Board generally

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or member hereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occuring more than six months prior to the filing of the change by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

No. 88-1459

Supreme Court, U.S.
FILED
MAR 16 1989
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CLERK

In The

Supreme Court of the United States

October Term, 1988

AMBROSE DAIGLE,

Petitioner,

v.

GULF STATES UTILITIES COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT GULF STATES UTILITIES COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 16, 1989

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QUESTIONS PRESENTED

1. Whether the grievance and arbitration provisions of the applicable collective bargaining agreement are mandatory, exclusive and binding. If so, Daigle's suit is barred by the six-month limitations period made applicable to hybrid Section 301/fair representation suits by *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983).

2. Whether alleged false and misleading statements by an employer to a union, which are said to have caused the union not to pursue a grievance on behalf of an individual, but which are not said to have had anything to do with the individual's late filing of a Section 301/fair representation suit, should render the *DelCostello* limitations period inapplicable.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Ambrose Daigle (Daigle).

Respondent is Gulf States Utilities Company (GSU).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW..... ii

INDEX OF AUTHORITIES..... iv

OPINIONS BELOW 1

JURISDICTION..... 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE WRIT..... 4

CONCLUSION 10

APPENDIX A

SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 185 .....App. 1-2

INDEX OF AUTHORITIES

Page

CASES

Bonnot v. Congress of Independent Unions Local #14, 331 F.2d 355 (8th Cir. 1964) 7

Cabarga Cruz v. Fundacion Educativa Ana G. Mendez, 822 F.2d 188 (1st Cir. 1987) 8

Ceres Marine Term. v. Intern. Longshoremen's Ass'n, 683 F.2d 242 (7th Cir. 1982) 6

Daigle v. Gulf State[s] Utilities Co., Local No. 2286, 794 F.2d 974 (5th Cir.) *cert. denied*, 479 U.S. 1008 (1986) 1, 3, 7

Deaton Truck Line, Inc. v. Local Union 612, Etc., 314 F.2d 418 (5th Cir. 1962) 7

DelCostello v. International Broth. of Teamsters, 462 U.S. 151 (1983) ..... i, 2, 3, 4, 5, 7

Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc., 546 F.2d 1107 (2d Cir. 1977) 6

Republic Steel Corporation v. Maddox, 379 U.S. 650 (1965) 5, 6, 8, 9

United Steelwkrs. of Amer. v. American Mfg. Co., 363 U.S. 564 (1960) 6

STATUTES

29 U.S.C. § 160(b) 2

29 U.S.C. § 185 (Section 301 of the Labor Management Relations Act) ..... 2, 5, App. 1-2

No. 88-1459

In The

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AMBROSE DAIGLE,

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BRIEF OF RESPONDENT GULF STATES UTILITIES COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Daigle's first Petition for Writ of Certiorari in this case was denied. *Daigle v. Gulf State[s] Utilities Co., Local No. 2286*, 794 F.2d 974 (5th Cir.) *cert. denied*, 479 U.S. 1008 (1986).

This Second Petition for Writ of Certiorari challenges a subsequent opinion by a three-judge panel of the Court of Appeals, which was not published. (5th Cir., No.

87-6252). The memorandum opinion of the magistrate was not published. (E.D. Tex., No. B-83-704-CA). The opinions of the lower courts are reproduced, with typographical errors, in Appendix A of the Petition for Writ of Certiorari. Hereinafter, references designated as "App. ___" are to Appendices of the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

Section 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b), is cited and reproduced in the Petition (App. B.). Section 10(b)'s six-month limitations period was made applicable to hybrid § 301/fair representation suits in *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983). Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, is cited and reproduced in the Appendix to this Brief. Section 301 authorizes suits for violations of collective bargaining agreements.

STATEMENT OF THE CASE

Petitioner Daigle's employment with respondent Gulf States Utilities Company (GSU) was terminated on October 12, 1982, as the result of his violation of a work

rule. (App. A., pp. la, 5a). At the time, Daigle was a member of a collective bargaining unit of employees represented by the International Brotherhood of Electrical Workers, Local 2286 (IBEW). (App. A, p. 2a). On November 19, 1982, Daigle was notified by IBEW that it would not pursue a grievance on his behalf under the applicable collective bargaining agreement. (*Id.*). Daigle filed suit on August 8, 1983 against GSU, IBEW, and other parties. (*Id.*). Daigle's complaint alleged, among other things, that GSU had breached the collective bargaining agreement by discharging him wrongfully without "just cause," and that IBEW had breached "its duty of fair representation by not pursuing grievance procedures." (*Id.*).

Daigle's suit was filed approximately ten (10) months after his discharge and nine (9) months after IBEW notified him that it would not pursue a grievance on his behalf.

The trial court dismissed Daigle's claims against all parties. In part relevant here, suit against GSU and IBEW was dismissed as time-barred by the applicable six-month limitations period established by this Court in *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983). (App. A, pp. 2a, 5a). The fifth circuit affirmed the dismissal of all claims and parties, with the sole exception of Daigle's wrongful discharge claim against GSU. *Daigle v. Gulf State[s] Utilities Co., Local No. 2286*, 794 F.2d 974 (5th Cir.), *cert. denied*, 479 U.S. 1008 (1986). The fifth circuit concluded that Daigle's wrongful discharge claim against GSU was time-barred by the six-month *DelCostello* limitations period *if* the applicable collective bargaining agreement contained mandatory, exclusive, and binding grievance and arbitration procedures. 794 F.2d at 978. On the other hand, the court concluded that the four-year

state law limitations period for breach of contract suits would apply if the procedures were "alternative procedures, leaving the aggrieved employee and the exclusive bargaining representative free to use or not use them as they wish." *Id.* Unfortunately, the collective bargaining agreement itself was not in the record. For this reason, the fifth circuit remanded Daigle's claim against GSU to the magistrate with instructions to interpret the collective agreement, and to apply the appropriate limitations period. *Id.* at 981. This Court denied Daigle's first Petition for Writ of Certiorari on December 8, 1986.

On remand, the magistrate concluded that the applicable grievance and arbitration provisions are mandatory, exclusive, and binding, and that Daigle's suit is therefore time-barred by the *DelCostello* limitations period. The case was dismissed by Memorandum Opinion and Order dated November 5, 1987 (App. A, pp. 5a-9a), and the fifth circuit affirmed in an unpublished opinion dated October 20, 1988 (App. A, pp. la-4a). Daigle's motion for panel rehearing was denied on November 17, 1988 (App. A, p. 11a), and once again he has petitioned this Court for a Writ of Certiorari.

The questions raised by the Petition are insubstantial and do not warrant review by this Court.

REASONS FOR DENYING THE WRIT

1. The courts below correctly held that the applicable grievance and arbitration procedures are mandatory, exclusive and binding, and that Daigle's suit is therefore time-barred by the *DelCostello* six-month limitations

period. Daigle's argument that the procedures are "optional" was correctly rejected by the lower courts, and further review of the matter by this Court is unnecessary.

Before turning to the correctness of the decisions below with respect to the contract interpretation question, it is first necessary to dispel some confusion created by the Petition. Daigle seems to argue that he was not required to "exhaust" contractual remedies. This argument is irrelevant because the courts below held that his suit is barred by limitations, not by his failure to "exhaust" contractual remedies. Of course, the general rule *is* that an individual who asserts a breach of a collective bargaining agreement must attempt to "exhaust" the agreement's grievance and arbitration procedures. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). However, the general *Maddox* "exhaustion" rule does not apply in a hybrid Section 301/fair representation suit. *DelCostello, supra*, 462 U. S. at 164. Indeed, the hybrid Section 301/fair representation theory was recognized in the first place because it would be inequitable to penalize an individual for his exclusive bargaining representative's refusal to "exhaust" mandatory, exclusive and binding contractual procedures in breach of its duty of fair representation. *Id.* at 164 & n. 14. Therefore, the dispositive issue in this appeal is not whether Daigle was required to "exhaust" the grievance and arbitration procedures of the collective bargaining agreement, but whether the procedures themselves are mandatory, exclusive and binding such that an aggrieved individual's sole judicial recourse for an alleged breach of the agreement is a Section 301/fair representation suit to which the *DelCostello* limitations period applies.

The progressive step grievance and arbitration procedures are set out in the record and summarized in the opinions below. (App. A, pp. 3a, 7a-8a). It is provided that "all . . . grievances must be presented and processed solely in accordance with" the procedure, and that any grievance not so presented and processed "will be deemed to no longer exist." (App. A, p. 31). Granted, the last step provides that a grievance not resolved earlier "may" be brought to "binding" arbitration. (App. A, p. 8a). The fifth circuit correctly held, however, that this word "may," read in the context of the agreement and federal labor law policy in favor of arbitration, simply grants the claimant "permission to abandon his complaint. However, if he chooses to pursue it, his exclusive remedy is through the procedures contained in the agreement." (App. A at p. 4a).

The fifth circuit's holding is consistent with well-established precedent. *See e.g., Republic Steel Corporation v. Maddox,* 379 U.S. 650, 658-59 (1965) (any doubts that "[u]se of the permissive 'may'" would permit avoidance of "the contract procedure . . . in favor of a judicial suit . . . must be resolved against such an interpretation."); *United Steelwkrs. of Amer. v. American Mfg. Co.,* 363 U.S. 564 (1960) (holding that arbitration of a dispute was required in a case where arbitration article was prefaced with the word "may"); *Ceres Marine Term. v. Intern. Longshoremen's Ass'n,* 683 F.2d 242, 248 (7th Cir. 1982) (rejecting employer's argument that use of word "may" in arbitration article made contractual procedure optional); *Local 771, I. A. T. S. E., AFL-CIO v. RKO General, Inc.,* 546 F.2d 1107, 1116 (2d Cir. 1977) (rejecting argument that

word "may" in arbitration article implied that "the parties had the option of invoking some remedy other than arbitration."); *Bonnot v. Congress of Independent Unions Local #14*, 331 F.2d 355, 359 (8th Cir. 1964) (holding by Justice Blackmun that "The obvious purpose of the 'may' language is to give an aggrieved party the choice between arbitration or the abandonment of its claim."); *Deaton Truck Line, Inc. v. Local Union 612, Etc.*, 314 F.2d 418, 422 (5th Cir. 1962) (rejecting argument that word 'may' prevented arbitration from being "compulsory or obligatory.").

2. Daigle's remaining arguments are infirm, and review of these arguments by the Court is not warranted.

Daigle seems to argue that GSU is "estopped" from interposing a limitations defense on the asserted ground that GSU, through "misstatements, [and] willful and known falsehoods," induced IBEW not to pursue a grievance. (Petition at 3). GSU denies these factual allegations but they are not material here. Even if these spurious factual allegations were true, GSU's alleged "false statements" to IBEW are said to have been made prior to November 19, 1982, the date on which IBEW notified Daigle that, based on its investigation of the facts, it would not pursue a grievance on Daigle's behalf. (Petition at 3). On November 19, 1982, the *DelCostello* limitations period began to run because on that date Daigle was put on notice that his case would proceed no further through the contractual procedures. *Daigle, supra*, 794 F.2d at 978. Daigle has never argued that GSU in any manner prevented or delayed his filing of a *lawsuit* after the accrual of his alleged cause of action. Therefore, even if GSU told "falsehoods" to IBEW so that IBEW would

not pursue a *grievance,* which is denied, such "falsehoods" could not have had anything to do with Daigle's nine (9) month delay in filing suit.

Finally, Daigle seems to argue that his late filing of suit should be excused because he has accepted the "finality" of his discharge and seeks damages rather than reinstatement. The authority he cites for this proposition, including *Cabarga Cruz v. Fundacion Educativa Ana G. Mendez,* 822 F.2d 188 (1st Cir. 1987), does not even address it. Apparently, Daigle's "finality" argument is a throwback to an argument rejected by the Court in *Maddox, supra.* Maddox argued, among other things, that the general "exhaustion" requirement should be excused in his case because he had accepted the "finality" of his discharge and was only seeking severance pay. Thus, Maddox asserted, the fact that he had bypassed the contractual grievance and arbitration procedures and had filed a lawsuit posed no threat to the stability of the ongoing collective bargaining relationship between his former employer and the union. The Court disagreed with Maddox, and reasoned as follows:

> "Although it is true that the employee asserting the claim will necessarily have accepted his discharge as final, it does not follow that the resolution of his claim can have no effect on future relations between the employer and other employees. Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship. Only in the situation in which no employees represented by the union remain employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a

> severance-pay claim. But even in that narrow situation, if applicable law did not require resort to contract procedures, the inability of the union and employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting effect on reaching an agreement."

379 U.S. at 656. Under the Court's reasoning in *Maddox*, Daigle's "finality" argument would be infirm even if his case turned on "exhaustion" rather than limitations. If possible, the "finality" argument is less persuasive in the limitations context because Daigle's acceptance of his discharge has nothing at all to do with the timeliness of his suit.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 16, 1989

APPENDIX

29 U.S.C. § 185. **Suits by and against labor organizations**

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena [sic], or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.